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Wrongful Death - Husband's Right to Recover the Loss of Pecuniary Benefits Resulting from the Death of His Wife

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isiana workmen, including plaintiff. The majority distinguished cases of lesser causal relation,[27] and observed that Louisiana jurisdiction had been sustained on less direct relationship between the activity and the cause of action than was evident in the instant case.[28]

The opposing judicial views are attributable to the difference of qualitative standards for the determination of sufficient minimum contacts. If Judge Hood's yardstick is proper, the instant case is an extreme application of the minimum contacts rule, perhaps the extreme limit beyond which jurisdiction cannot be maintained. Yet if Judge Tate's qualitative standards are valid, the instant case was only a routine application of the *McGee* standard. The fact that the Supreme Court which had decided *McGee* and had decided *Denckla* dismissed the appeal in the instant case for "want of a substantial federal question"[29] and that Justice Harlan went so far as to urge that the appeal be dismissed for "want of jurisdiction"[30] supports the conclusion that the outer limits of the 1960 procedural statute have yet to be defined.[31]

Billy J. Tauzin

WRONGFUL DEATH — HUSBAND'S RIGHT TO RECOVER THE LOSS OF PECUNIARY BENEFITS RESULTING FROM THE DEATH OF HIS WIFE

The plaintiff sued on behalf of himself and his minor son in federal district court under diversity of citizenship for the loss

27. See cases cited 170 So. 2d at 518, 527.

28. See Covington v. Southern Specialty Sales Co., 158 So. 2d 79 (La. App. 1st Cir. 1963), where the defendant nonresident manufacturer had purposely entered Louisiana in connection with the sales of mowing machines, one of which injured plaintiff. The defendant had a representative come to Louisiana every four or five weeks to supply technical aid, information, and assistance in ordering defendant's products. This activity was not directly connected with the sale to the retailer of the specific machine which injured plaintiff after the retailer sold it. Yet Louisiana was held to have jurisdiction where the cause of action was merely indirectly connected with the minimal business activity.

29. 382 U.S. 16 (1965).

30. *Ibid.*

31. See LA. R.S. 13:3201-3207 (Supp. 1964). This statute, commonly called the "Louisiana long-arm statute," enumerates in some detail the types of activity sufficient to sustain personal jurisdiction over nonresident defendants, and applies to all nonresidents rather than to corporations alone as does LA. R.S. 13:3471(1) (1950). Since the instant case involved a suit for workmen's compensation, which is classified as an action *ex contractu*, it seems the case could have been disposed of under the contractual provision of the "long-arm statute," LA. R.S. 13:3201(a) (Supp. 1964).

of pecuniary benefits resulting from the death of his wife caused by the negligence of the defendant's insured. The court, applying Louisiana law, *held*, that unless the plaintiff "is completely unable to support himself or his son and they both were totally reliant"[1] upon the income of the deceased for support, the claim will be denied. *Kruithof v. Hartford Acc. & Indem. Co.*, 241 F. Supp. 351 (W.D. La. 1965).

At common law[2] as well as in early Louisiana jurisprudence,[3] the death of a human being did not give rise to a cause of action. Prompted by the celebrated Lord Campbell's Act,[4] every American state now provides a statutory remedy for wrongful death.[5] The purpose of these statutes is to repair the loss suffered by members of the family when another member is killed. Most states limit recovery to "pecuniary" losses,[6] but these can em-

1. Kruithof v. Hartford Acc. & Indem. Co., 241 F. Supp. 351, 354 (W.D. La. 1965).

2. In 1808 Lord Ellenborough held that a husband had no cause of action for the loss of his wife's services caused by her death, and ruled that "in a civil court the death of a human being could not be complained of as an injury." Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (N.P. 1808).

3. McCubbin v. Hastings, 27 La. Ann. 713 (1875); Frank v. New Orleans & Carrollton R.R., 20 La. Ann. 25 (1868); Earhart v. New Orleans & Carrollton R.R., 17 La. Ann. 243 (1865); Hubgh v. New Orleans & Carrollton R.R., 6 La. Ann. 495 (1851).

4. Fatal Accidents Act, 9 & 10 VICT. c. 93 (1846).

5. 1 Prosser, Torts § 121 (3d ed. 1964). These statutes generally provide for a "survival" action — that cause of action the deceased would have had if death had not ensued; a "wrongful death" action — that cause of action for the loss sustained by certain designated beneficiaries; or both. LA. CIVIL CODE art. 2315 (1870) provides for both causes of action:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person die, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse. child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively."

6. 1 PROSSER, TORTS § 121 (2d ed. 1964).

brace a wide variety of tangible benefits, *i.e.*, the value of the support, services, and contributions the family could reasonably have expected if death had not intervened.[7] Thus, in the case of death of a wife, the loss not only of her contributions to the family but also of the value of her services in the household is recoverable in most jurisdictions.[8] The beneficiaries' expectation of financial contributions from the wife is the measure of recovery, and not her "earnings" as such, the former being perhaps, but not necessarily, congruent with her income.[9]

Louisiana does not limit recovery to "pecuniary" losses, but rather compensates for all losses, including loss of love, affection, and companionship.[10] In the case of death of a husband,[11]

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7. *Ibid.*

8. Louisville & N.R.R. v. Tucker, 211 F.2d 325 (6th Cir. 1954); In re Wood's Petition, 145 F. Supp. 848 (W.D. Mo. 1956); Rosenblatt v. United States, 112 F. Supp. 114 (E.D.N.C. 1953); St. Louis-San Francisco R.R. v. Beasley, 205 Ark. 688, 170 S.W.2d 667 (1943); Torres v. Los Angeles, 58 Cal. 2d 35, 22 Cal. Rptr. 866, 372 P.2d 906 (1962); Burke v. San Francisco, 111 Cal. App. 2d 314, 244 P.2d 708 (1952); Martin v. Manfeldt, 100 Cal. App. 2d 327, 223 P.2d 501 (1950); Potter v. Empress Theatre Co., 91 Cal. App. 2d 4, 204 P.2d 120 (1949); Hornstein v. Marks, 21 Conn. Sup. 233, 153 A.2d 923 (1958); Grimes v. King, 311 Mich. 399, 18 N.W.2d 870 (1945); Thoirs v. Pounsford, 210 Minn. 462, 299 N.W. 16 (1941); Bulkley v. Thompson, 240 Mo. App. 588, 211 S.W.2d 83 (1948); Waterman v. State, 24 Misc. 2d 783, 206 N.Y.S.2d 380 (1960); Granai v. State, 206 Misc. 984, 136 N.Y.S.2d 238 (1954); Lamm v. Lorbacher, 235 N.C. 728, 71 S.E.2d 49 (1952); Pauss v. Adamski, 195 Ore. 1, 244 P.2d 598 (1952); Spangler v. Helm's New York-Pittsburgh Motor Express, 386 Pa. 482, 153 A.2d 490 (1959); Slidelkum v. Animal Rescue League, 353 Pa. 408, 45 A.2d 59 (1946); Continental Bus System v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959).

9. Noel v. United Aircraft Corp., 342 F.2d 232 (3d Cir. 1964); McStay v. Przychocki, 9 N.J. Super. 365, 74 A.2d 370 (1950); Herro v. Northwestern Malleable Iron Co., 181 Wis. 198, 194 N.W. 383 (1923).

10. Silverman v. Travelers Ins. Co., 277 F.2d 257 (5th Cir. 1960); Fidelity & Cas. Co. of N.Y. v. Talbot, 234 F.2d 425 (5th Cir. 1956); Thompson v. New Orleans Ry. & Light Co., 148 La. 698, 87 So. 716 (1921); Dougherty v. New Orleans Ry. & Light Co., 133 La. 993, 63 So. 493 (1913); Roby v. Kansas City So. Ry., 130 La. 896, 58 So. 701 (1912); Robertson v. Town of Jennings, 128 La. 795, 55 So. 375 (1911); Wooten v. United Irrigation & Rice Milling Co., 128 La. 294, 54 So. 824 (1911); Bourg v. Brownell-Drews Lumber Co., 120 La. 1009, 45 So. 972 (1908); Dobyns v. Yazoo & M.V.R.R., 119 La. 72, 43 So. 934 (1907); Parker v. Crowell & Spencer Lumber Co., 115 La. 463, 39 So. 445 (1905); Hampton v. Security Storage & Van Co., 148 So. 2d 788 (La. App. 4th Cir. 1962); Freeman v. United States Cas. Co., 88 So. 2d 423 (La. App. 2d Cir. 1956); Barnes v. Red River & G.R.R., 128 So. 724 (La. App. 2d Cir. 1930).

11. Dowell, Inc. v. Jowers, 166 F.2d 214 (5th Cir. 1948); Illinois Cent. R.R. v. O'Neill, 100 C.C.A. 658, 177 Fed. 328 (5th Cir. 1910); Dougherty v. New Orleans Ry. & Light Co., 133 La. 993, 63 So. 493 (1913); Lloyd v. T. L. James & Co., 178 So. 2d 370 (La. App. 1st Cir. 1965); Averette v. Travelers Ins. Co., 174 So. 2d 881 (La. App. 1st Cir. 1965); Landry v. American Sur. Co. of N.Y., 149 So. 2d 738 (La. App. 1st Cir. 1963); Hampton v. Security Storage & Van Co., 148 So. 2d 788 (La. App. 4th Cir. 1962); Jones v. Lee, 144 So. 2d 405 (La. App. 1st Cir. 1962); Navarrett v. Joseph Laughlin, Inc., 20 So. 2d 313 (La. App. Orl. Cir. 1945), *reversed on other grounds*, 209 La. 417, 24 So. 2d 672 (1945).

a child,[12] or even a brother[13] the Louisiana courts consistently award to other members of the family the amount of the financial contributions they could reasonably have expected from the deceased if death had not occurred. In order to recover it is not necessary to show dependency upon the deceased,[14] nor is it necessary to show a legal obligation of the deceased to support the beneficiary.[15] In *Pennington v. Justiss-Mears Oil Co.*[16] a wife was permitted to recover her financial loss resulting from the death of her husband, although according to a premarital contract she had no legal right to either his earnings or his acquisitions. The court stated:

> "We are not here concerned with the legally enforceable obligations which flow from statutory provisions, but with the actual pecuniary and material loss which has been sustained as a natural consequence of a tortious act."[17]

The Louisiana jurisprudence reveals four relevant cases applying the wrongful death statute to the death of a wife or mother. In *Viosca v. Touro Infirmary*,[18] the Fourth Circuit considered as an element of damages the husband's reliance upon the deceased wife as a chauffeur because he was disabled from driving and allowed recovery for the loss of these services. The First Circuit in *Toney v. Pope*[19] considered that the deceased wife "helped her husband with his dairy farm and school bus route"[20] in granting recovery to the husband. Also, in *Gunter*

12. Caldwell v. United States Cas. Co. of N.Y., 129 So. 2d 813 (La. App. 2d Cir. 1961); Freeman v. Audubon Ins. Co., 120 So. 2d 105 (La. App. 1st Cir. 1960); Watson v. McEacharn, 99 So. 2d 138 (La. App. 2d Cir. 1957); Kaough v. Hadley, 165 So. 748 (La. App. 1st Cir. 1936).

13. Freeman v. United States Cas. Co., 88 So. 2d 423 (La. App. 2d Cir. 1956).

14. Evans v. United States, 100 F. Supp. 5 (W.D. La. 1951); Caldwell v. United States Cas. Co. of N.Y., 129 So. 2d 813 (La. App. 2d Cir. 1961); Freeman v. Audubon Ins. Co., 120 So. 2d 105 (La. App. 1st Cir. 1960); Watson v. McEacharn, 99 So. 2d 138 (La. App. 2d Cir. 1957); Kaough v. Hadley, 165 So. 748 (La. App. 1st Cir. 1936).

15. Evans v. United States, 100 F. Supp. 5 (W.D. La. 1951); Caldwell v. United States Cas. Co. of N.Y., 129 So. 2d 813 (La. App. 2d Cir. 1961); Pennington v. Justiss-Mears Oil Co., 123 So. 2d 625 (La. App. 1st Cir. 1960); Freeman v. Audubon Ins. Co., 120 So. 105 (La. App. 1st Cir. 1960); Watson v. McEacharn, 99 So. 2d 138 (La. App. 2d Cir. 1957); Freeman v. United States Cas. Co., 88 So. 2d 423 (La. App. 2d Cir. 1956); Kaough v. Hadley, 165 So. 748 (La. App. 1st Cir. 1936).

16. 123 So. 2d 625 (La. App. 1st Cir. 1960).

17. *Id.* at 634.

18. 170 So. 2d 222 (La. App. 4th Cir. 1965).

19. 110 So. 2d 226 (La. App. 1st Cir. 1959).

20. *Id.* at 228.

v. State[21] the same court recognized that "at the time of her death Mrs. Gunter was in training to become a practical nurse and was also selling Avon toilet products."[22] The implication seems to be that the husband had lost contributions he could reasonably have expected from the earnings of his wife as a sales person and from her prospective earnings as a practical nurse. Finally, in *Evans v. United States*[23] a husband, suing for the loss suffered by his children as a result of the death of their mother, recovered the $25 per month that she had been contributing to their support. Thus, the general rule appears to be that the portion of the wife's earnings which her family could reasonably expect to receive should be included in the measure of recovery.

In the instant case, Mr. Kruithof was suing not only for his individual loss of pecuniary benefits resulting from the death of his wife, but also for the loss suffered by his minor son. The court in denying recovery, based its decision on the Second Circuit case, *Parker v. Smith*,[24] where a husband was denied recovery for the value of the services rendered by his deceased wife in his office, the value of which he had measured by the cost of hiring someone to replace her. The court in that case reasoned:

> "During the lifetime of Mrs. Parker, she was not working for the plaintiff, but rather both the plaintiff and his deceased wife were working for the community of acquets and gains which existed between them and which was terminated at the time of her demise. Any claim that exists for the loss of services of Mrs. Parker is a claim to be asserted by the community of acquets and gains, not by the husband, the head and master, in his individual capacity. Therefore, since this would be a claim to be asserted by the community, it became extinct at the time of the termination of the community."[25]

In the instant case the court stated that it would follow *Parker* and deny recovery unless it could be shown that Mr. Kruithof was "completely unable to support himself or his son and that they both were totally reliant upon Mrs. Kruithof's income for support."[26]

21. 127 So. 2d 31 (La. App. 1st Cir. 1961).
22. *Id.* at 39.
23. 100 F. Supp. 5 (W.D. La. 1951).
24. 147 So. 2d 407 (La. App. 2d Cir. 1962).
25. *Id.* at 411.
26. Kruithof v. Hartford Acc. & Indem. Co., 241 F. Supp. 351, 354 (W.D. La.

The result reached in *Parker v. Smith* can be reconciled with article 2315 and the cases discussed above. In *Parker* the wife was working in the husband's business and he was seeking recovery predicated upon the loss to the business — the cost of replacing her. Thus, in effect he was asking the court to protect his business against the loss of an employee, who in that case happened to be his wife. The court was justified in rejecting this demand because article 2315 does not protect the employer-employee relationship, but rather protects the family relationship. Therefore, *Parker v. Smith* is not an adequate basis for denying the husband's recovery of his pecuniary loss resulting from the death of his wife.

The court's denial of recovery on the basis that the income of the wife belonged to the community of acquets and gains which ceased to exist on her death is analytically unsound because it fails to recognize that the loss caused by death of a member of the family is suffered by the other members of the family and is not suffered by a legal fiction, the marital community. The husband and the child have lost the contributions which the wife was making to the maintenance of the household. In addition, the application of the community property concept to this case fails to distinguish the earnings of the wife from those of the husband. Both are community property,[27] but the Louisiana courts consistently allow recovery by the wife for the loss of the financial contributions of her husband,[28] whereas this case would deny recovery to the husband for the loss of the financial contributions of his wife. Finally, the court concedes that the husband could recover if he is totally dependent upon his wife. Such a holding is not consistent with the community property concept because her earnings would still belong to the community of acquets and gains which, according to the reasoning of the court, had ceased to exist.

Moreover, the holding in the instant case denying recovery to the father and minor son for the loss of support of the mother disregards the prior Louisiana jurisprudence[29] and is contrary to the true theory of wrongful death, that the members of the

1965). It is interesting to note that the court, in distinguishing the instant case from the cases where the wife is merely injured and the husband is entitled to recover, stated that in the latter cases the community was still in existence inasmuch as the wife was only injured and not killed.

27. LA. CIVIL CODE art. 2334 (1870).

28. See note 11 *supra* and accompanying text.

29. See note 14 *supra* and accompanying text.

family are entitled to recover the loss of the financial contributions which they could reasonably have expected to receive from the deceased if death had not ensued.

When a Louisiana court is faced with the question of whether to allow a husband recovery for the loss of the financial contributions of his wife upon her wrongful death, it is hoped that the instant case will be rejected. It is in conflict with the existing Louisiana jurisprudence, is contrary to the position of other jurisdictions including those with community property systems,[30] is inconsistent with the basic policy of article 2315, and it distorts the community property concept and puts Louisiana in the intolerable situation of granting recovery for injuries to a spouse but not for the spouse's death, making it less costly for the defendant to kill her than merely to injure her.[31]

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30. No cases have been found in which the husband's claim for the loss of the value of the wife's financial contributions has been denied on the theory that the community had ceased to exist at her death.

31. Most lawyers are familiar with the legend, quite unfounded, that this was the original reason that passengers in Pullman car berths rode with their heads to the front. Also that the fire axes in railroad coaches were provided to enable the conductor to deal efficiently with those who were merely injured. 1 PROSSER, *Torts* § 121 n.42 (3d ed. 1964).